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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRENNAN TYRELL JONES,

Defendant and Appellant.

C083149

(Super. Ct. Nos. SF132584A,
STK-CR-FE-2015-0007839)

A jury found defendant Brennan Jones guilty of second degree robbery (Pen. Code, § 211),¹ and found true allegations that he had sustained a serious felony conviction that qualified as both a strike (§§ 667, subd. (d); 1170.12, subd. (b)) and a five-year enhancement (§ 667, subd. (a)). The trial court sentenced defendant to 11 years

¹ Undesignated statutory references are to the Penal Code.

in prison, consisting of the mid-term of three years doubled due to the strike prior plus five years for the prior serious felony enhancement.

On appeal, defendant contends the trial court erred in (1) denying him a continuance so he could make a prima facie case that the jury panel did not represent a fair cross-section of the community; (2) denying him a jury trial on identity for the strike prior; (3) taking judicial notice of court records to determine identity; and (4) responding to a jury question without providing the response to the defense. He also raises three sentencing issues, arguing the trial court erred in denying him a continuance, denying his motion to strike his strike, and sentencing him to 11 years. We find no prejudicial error and affirm.

As we explain, *post*, based on intervening events we shall remand the matter to the trial court for the limited purpose of the exercise of discretion to dismiss the five-year enhancement previously mandated by section 667, subdivision (a).

FACTS

Given the nature of the appellate contentions, we state the facts only briefly. On September 3, 2015, defendant entered a Rabobank in Stockton. When he asked to make a deposit to his sister's account, the teller told him he needed the account number. He said he would return. When he returned to the bank, defendant encountered a friend from high school; they hugged and exchanged pleasantries. Defendant then went to the teller and handed her a deposit slip that said "Put it up" or "Give me it" or something similar. The frightened teller gave defendant about \$2,000 from her cash drawer and defendant left.

The robbery was captured on a surveillance video. The victim's identification of defendant as the robber was corroborated by the identification provided by his friend with whom he had spoken in the bank and by fingerprints from the writing station and teller station in the bank. The People also introduced evidence that DNA from a coffee cup and cigar discarded right outside the bank matched defendant's DNA

DISCUSSION

I

Denial of Continuance to Challenge Jury Panel

Defendant contends the trial court erred in denying the request, made at the beginning of voir dire, for a continuance to make a prima facie case that the jury panel should be discharged because it did not represent a cross-section of the community. He notes that a challenge to a jury panel may be made at any time prior to the jurors being sworn to hear the case. (Code Civ. Proc., § 225, subd. (a)(1).)

Although the Attorney General argues the claim is forfeited by failure to request a continuance in the trial court, we agree with defendant that it was clear he was asking for additional time to make the challenge and will reach the merits.

When the panel was brought in for jury selection, defense counsel noted there were only two to four African-Americans. Defendant, who is African-American, asked for a new panel, challenging the venire based on the lack of representation of African-Americans. The trial court noted that a challenge to a jury panel must be in writing under Code of Civil Procedure section 225. Further, defendant had not made a prima facie case that the jury was not selected from a fair cross-section of the community under *Duren v. Missouri* (1979) 439 U.S. 357, 358-359 [58 L.Ed.2d 579] (*Duren*). The court denied the motion. Counsel objected that she had not had an opportunity to obtain demographics to support the challenge because she had just seen the panel; she requested an opportunity to present demographics.

The trial court responded that a challenge to the process by which jurors are summoned must be considered ahead of time, by a motion in limine. The court also noted there was no way to know at that time how many African-Americans had been summoned for possible jury service.

“Under the federal and state Constitutions, a defendant is entitled to a jury drawn from a representative cross-section of the community. [Citations.] This guarantee

mandates that courts select juries from pools that do not systematically exclude distinctive groups in the community. [Citation.]” (*People v. Lucas* (2014) 60 Cal.4th 153, 255, disapproved of on another point by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53 fn. 19.)

In *Duren*, *supra*, 439 U.S. 357, the United States Supreme Court created a three-prong test for a prima facie showing of a violation of the fair cross-section right. “In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” (*Id.* at p. 364.)

Defendant contends he should have been granted a continuance to make a prima facie showing because he could not have made that showing until he saw the jury panel. Division Two of the First District rejected this same contention in *People v. De Rosans* (1994) 27 Cal.App.4th 611 (*De Rosans*). We find their reasoning persuasive.

In upholding the denial of a continuance after voir dire had begun to permit defendant to make a prima facie showing under *Duren*, the *De Rosans* court explained: “Appellant’s argument that the trial court should have granted a continuance rests on an erroneous assessment of the nature of a fair cross-section claim. He is not entitled to a panel that represents a cross-section of the community. Rather, he is entitled to a panel *drawn from* a representative cross-section of the community. Thus, a challenge to the jury panel is always necessarily a challenge not to the composition of the panel but to the procedure by which the panel is composed. Indeed, the actual composition of the jury panel in a defendant’s case is irrelevant to a challenge to the jury panel.” (*De Rosans*, *supra*, 27 Cal.App.4th at p. 621.)

“The requirements of section 225, subdivision (a), are consistent with the nature of a fair cross-section challenge. The requirement of a written motion, served on the parties and the jury commissioner, and stating the facts on which the challenge is based, clearly contemplates a challenge based on information that in most cases is available well before the panel appears for voir dire.

“The record in this case shows that appellant's trial counsel was appointed February 25, 1993. The court heard in limine motions on April 20 and the trial began on April 21. Appellant thus had almost two months in which to prepare and file a challenge to the jury panel. The trial court did not abuse its discretion in denying appellant's motion for a continuance to make such a challenge once the trial had commenced.” (*De Rosans, supra*, 27 Cal.App.4th at pp. 621-622.)

Here, too, defendant bases his claim on the *composition* of the particular panel, rather than on the *process* by which the panel was chosen. But it is not enough to show that a distinctive group is underrepresented on a particular panel. “Rather, the defendant must show that the underrepresentation ‘is the result of an improper feature of the jury selection process.’ ” (*People v. Massie* (1998) 19 Cal.4th 550, 580.) Defendant offered no evidence to even suggest systematic exclusion, or any other improper feature of the jury selection process.

The record shows defendant’s trial counsel was appointed on or before April 4, 2016. Jury selection began July 12, 2016. Thus, counsel had four months to investigate and prepare a challenge to the jury selection process. “Continuances shall be granted only upon a showing of good cause.” (§ 1050, subd. (e).) Waiting until the trial had begun and the jury panel was called to claim systematic exclusion of African-Americans, with no evidence to support the claim, did not establish good cause for a continuance. The trial court did not err in denying the request therefor.

II

Jury Trial on Issue of Identity of Person Suffering Prior Conviction

The amended information alleged, and the jury found true, that in 2002 defendant suffered a conviction for assault with the infliction of great bodily injury (GBI). The GBI enhancement made the assault conviction a serious felony (§ 1192.7, subd. (c)(8)), qualifying it as both a five-year enhancement (§667, subd. (a)) and a strike (§ 667, subd. (d), 1170.12, subd. (b)). Prior to submitting the issue of the prior conviction to the jury, the trial court found beyond a reasonable doubt that defendant was the person who had suffered the conviction.

Defendant contends the trial court erred in denying him a jury trial on the issue of whether he was the person who had suffered the 2002 prior conviction. He recognizes that under section 1025, subdivision (c) the identity of the person who suffered the alleged prior conviction is a question for the court. He contends, however, that such judicial factfinding is unconstitutional.

Section 1025 provides in relevant part: “(b) Except as provided in subdivision (c), the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived. [¶] (c) Notwithstanding the provisions of subdivision (b), the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.”

Section 1025 gave criminal defendants in California a statutory, not constitutional, right to have a jury determine certain factual issues relating to a prior conviction alleged for purposes of sentencing enhancements. (*People v. Williams* (2002) 99 Cal.App.4th 696, 700.) In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], the United States Supreme Court considered whether the Due Process Clause of the Fourteenth Amendment required a jury finding on facts that were used to increase a criminal

defendant's sentence. The court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.)

The "fact of a prior conviction" does not include all factual issues relating to the prior conviction; some issues must be decided by a jury unless defendant waives that right. In *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), the charging document alleged defendant had a strike prior, assault (§ 245, subd. (a)(1)). The definition of that crime--assault with a deadly weapon or with force likely to produce GBI--is broader than the definition of a serious felony. An assault conviction qualifies as a serious felony only if committed with a deadly weapon (unless accompanied by certain enhancements). To determine if defendant committed assault with a deadly weapon, the trial court reviewed the transcript of the preliminary hearing and determined that she did. (*Gallardo*, at p. 123.)

On appeal, Gallardo contended her increased punishment for the serious felony rested on judicial factfinding that violated her Sixth Amendment right to a jury trial. (*Gallardo, supra*, 4 Cal.5th at pp. 123-124.) Previously, in *People v. McGee* (2006) 38 Cal.4th 682, our Supreme Court had held the Sixth Amendment permits sentencing courts to review the record of defendant's prior conviction to determine if it qualifies as a serious felony for sentencing purposes. The *Gallardo* court determined that *McGee* should be reconsidered in light of more recent United States Supreme Court decisions. (*Gallardo*, at p. 124.) The *Gallardo* court held a sentencing court may identify those facts the jury necessarily found in finding defendant guilty, as well as those facts to which defendant waived a jury determination by pleading guilty; however, the court may not make *its own* factual findings regarding defendant's conduct to increase the maximum sentence. (*Id.* at p. 134.) "The judicial factfinding permitted under the *Almendarez-Torres* exception does not extend 'beyond the recognition of a prior conviction.' [Citation.] Consistent with this principle, and with the benefit of further

explication by the high court, we now hold that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the ‘nature or basis’ of the prior conviction based on its independent conclusions about what facts or conduct ‘realistically’ supported the conviction. [Citation.] That inquiry invades the jury's province by permitting the court to make disputed findings about ‘what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.’ [Citation.] The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.” (*Gallardo*, at p. 136, fn. omitted.)

The *Gallardo* court remanded the case “to permit the People to demonstrate to the trial court, based on the record of the prior plea proceedings, that defendant's guilty plea encompassed a relevant admission about the nature of her crime.” (*Gallardo*, *supra*, 4 Cal.5th at p. 139.)

Defendant contends that under *Gallardo* he was entitled to a jury trial on the issue of identity; that is, whether he was the person who suffered the 2002 assault conviction. We disagree. The issue of identity does not turn, as it did in *Gallardo*, on factual questions concerning defendant’s conduct in committing the prior offense, conduct the previous jury had no reason to determine. Rather, in determining that defendant was the person who suffered the 2002 conviction, the trial court was determining “the fact of a prior conviction.” Based on the record of the prior conviction, the court determined what “the jury was necessarily required to find to render a guilty verdict.” (*Gallardo*, *supra*, 4 Cal.5th at p. 136.) Nothing in *Apprendi* or *Gallardo* requires *that* determination to be made by a jury. *Apprendi's* exception to a jury trial for the fact of a prior conviction encompasses the issue of identity.

Moreover, our Supreme Court has confirmed that section 1025, subdivision (c) permits the trial court to decide the issue of identity. (*People v. Epps* (2001) 25 Cal.4th

19, 25.) The *Gallardo* court cited to section 1025, subdivision (c) uncritically. (*Gallardo, supra*, 4 Cal.5th at p. 125.) We are, of course, bound by our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III

Judicial Notice of Court Records to Determine Identity

Defendant contends that in finding defendant was the person who suffered the prior conviction, the trial court erred in taking judicial notice of certain court records. Defendant contends the court did not follow the procedure of Evidence Code section 455 in that it did not make the matters judicially noticed available to the defense and did not make them part of the record.

A. Background

To prove defendant was the person who suffered the 2002 conviction, the People offered Exhibit 69. Exhibit 69 contained the following court documents for the 2002 conviction in case SF085727A: the abstract of judgment, the minute orders for the verdict and sentencing, the verdict forms, and the amended information. Defendant noted those records were for a Brennn Jones, while defendant's name is spelled with an "a": Brennan. The trial court then took judicial notice of its court file in this case, SF132584, and compared it to the certified records of the prior. Both gave the same birth dates for the defendant. The court noted that the court file also contained a CLETS printout that listed three aliases for defendant, one of which was Brennn, as spelled in the other records.

Defendant complained he did not know on what document the trial court was relying. Although recognizing that the court could take judicial notice of its own file, defendant objected that it could not take notice of hearsay contained therein. The court stated it understood the objection and then also took judicial notice of a misdemeanor case file, which listed defendant as Brennan Jones with the same birth date. The court

then found beyond a reasonable doubt that defendant was the person who had suffered the 2002 assault conviction.

On appeal, defendant sought to augment the record to include the misdemeanor file and the court file for SF085727A, the 2002 conviction. The superior court clerk declared the clerk's transcript on appeal contained the entire file in SF085727A. The misdemeanor was not on appeal, so its file was not included, and the misdemeanor had been dismissed. The clerk's transcript does not contain the CLETS printout that the court referenced.²

B. *Analysis*

Evidence Code section 455 provides procedural safeguards concerning judicial notice. It provides in relevant part:

(a) If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

Although here the trial court did not offer defendant an opportunity to review the court records before taking judicial notice of them, defendant did have an opportunity to be heard as to both the propriety of taking judicial notice and the tenor of the matter to be noticed, as required by subdivision (a) of Evidence Code section 455. Defendant agreed it was proper to take judicial notice of court records. (*Id.*, § 452, subd. (d).) As

² The probation report, prepared at a later date, is in the record and does contain criminal record data showing defendant had three aliases, including Brennen Jones.

to the contents of these records, defendant lodged a hearsay objection, which the court implicitly overruled. That defendant had the opportunity to object makes this case distinguishable from *People v. Banda* (2018) 26 Cal.App.5th 349. There, the trial court “did not indicate it was taking judicial notice of a police report until after it had ruled, depriving Banda of both notice and the opportunity to object.” (*Id.* at p. 360.)

On appeal, defendant makes no specific hearsay objection to the information on which the trial court relied, noting in a single sentence buried in his briefing that “to the extent [the court] took judicial notice of the truth of the matter in these records such was hearsay.” This does not amount to a proper argument. In any event, we note a CLETS printout has been found to be admissible over a hearsay objection as an official record under Evidence Code section 1280. (*People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1477-1481.)

Not all of the material judicially noticed was made part of the record, but key parts were. The record contains the exhibit of court records of defendant’s 2002 prior conviction. His birth date appears on numerous minute orders. Defendant does not challenge the sufficiency of the evidence of identity, but merely the process by which judicial notice was taken. While we do not condone the failure to make a complete record of the material the trial court considered, we find the error harmless. (See *People v. Vega* (1971) 18 Cal.App.3d 954, 958 [failure to follow Evidence Code section 455 harmless beyond a reasonable doubt where no contrary information provided]; *People v. Carnesi* (1971) 16 Cal.App.3d 863, 867 [failure to follow Evidence Code section 455 only a “cosmetic defect” where fact unchallengeable].)³

³ Defendant’s briefing completely omits any discussion of prejudice except to baldly assert, without any analysis, that “such errors cannot be deemed harmless.”

IV

Response to Jury Question

Defendant contends the trial court erred in responding to a question from the jury during deliberations on the prior conviction without first providing the response to the defense. Defendant contends the written response to the jury differed from what was discussed with counsel. Defendant asserts this error was not harmless given the speed with which the jury reached verdicts.

A. Background

After a conversation with court staff, the prosecutor provided verdict forms for the prior conviction that referenced sections 667, subd. (d) and 1170.12, subdivision (b). The jury instructions did not mention these code sections. During deliberations, the jury sent a question to the court:

“We need a person to person conversation. Multiple questions.
(1) We don’t see code section 1170.12(B) in exhibit [*sic*] #69
(2) Are we to vote (True or false) if he is guilty of code 245(a)(1)
& 12022.7(b) OR for codes 1170.12(B) and 667(D) and 667(A)[?]
(3) What is this verdict for?”

The People argued the court should not answer questions 1 and 3 but respond that the jury should determine if defendant had been convicted of section 245, subdivision (a)(1) and 12022.7, subdivision (b). The defense argued the court should simply read the jury instruction again.

The discussion focused on the verdict forms given to the jury. The People noted there was no need to include section 11701.12 on the verdict forms. The defense argued the jury’s confusion was the result of the verdict forms provided by the People without defendant’s approval. He argued the change in verdict forms was prejudicial and asked for a mistrial. The trial court asked the People to prepare new verdict forms. The court told counsel the response to the jury would refer to the jury instructions and explain question Nos. 1 and 3 were not relevant and the jury’s task was simply to decide if

defendant had suffered the prior conviction. The court denied the motion for a mistrial, finding no prejudice and no misstatement of the law.

The court sent the following written response to the jury.

“Please refer to instructions 3101 and 221.

(1) Please disregard Penal code sections 1170.12(B), 667(D) and 667(A). Those sections apply to the court’s duties.

(3) [*sic*] The defendant and the People have the right to have the jury determine if the defendant suffered a prior conviction.

(2) [*sic*] You are to vote true or not true for the allegation that the defendant suffered a prior conviction for 245(a)(1) and 12022.7(b) from 11/17/2002, San Joaquin Superior Court. No findings for 1170.12(B), 667(a) or 667(d) are necessary.”

Defendant renewed his request for a mistrial, arguing the trial court’s written response differed from what the court had told counsel. The court had said it would answer that question #3 was not relevant, but instead told the jury, “The defendant and the People have the right to have the jury determine if the defendant suffered a prior conviction.” Defendant was not allowed to address that response and believed it interfered with jury deliberations. The People argued the response was factually and legally correct and not far outside what the court had indicated its response would be. The court agreed its response was “a little more wordy” than it had indicated. It would have preferred to give counsel the written response, but other matters had come up and required the court’s attention. The court believed the response was neutral and denied the motion for mistrial.

B. *Analysis*

Although not clearly stated, we assume defendant contends he was denied counsel at a critical stage of the proceedings because his counsel did not see the written response

before it was sent to the jury. He further contends the trial court failed to follow the procedure dictated of section 1138. Again, he does not argue prejudice.

“Penal Code section 1138 requires that any questions posed by the jury regarding the law or the evidence be answered in open court in the presence of the accused and his or her counsel, unless presence is waived. Communication between judge and jury during deliberations without affording defendant and counsel an opportunity to be present impinges on a defendant's constitutional right to the assistance of counsel. [Citations.] The error does not require reversal unless prejudice appears. [Citations.] Reversal is not required if the court is satisfied beyond a reasonable doubt that the error did not contribute to the verdicts. [Citation.]” (*People v. Chagolla* (1983) 144 Cal.App.3d 422, 432.)

Here, the trial court did consult with counsel before answering the jury’s questions. “A statutory or constitutional violation occurs only where the court actually provides the jury with instructions or evidence during deliberations without first consulting counsel.” (*People v. Mickle* (1991) 54 Cal.3d 140, 174.) Thus, *People v. Dagnino* (1978) 80 Cal.App.3d 981, on which defendant relies, is distinguishable because there the court gave supplemental instructions to the jury during deliberations without notifying counsel. In *Dagnino*, in response to jury questions, the court gave the jury instructions on the difference between first and second degree burglary, and the definition of an accessory; in response to a question about circumstantial evidence, the court gave the jury *all* the instructions it had previously given. (*Id.* at pp. 984, 985-986.) The appellate court found instructing the jury outside the presence of counsel was both statutory and constitutional error. (*Id.* at p. 988.) The court further found the error was not harmless beyond a reasonable doubt because counsel had not had the opportunity to ensure that only those instructions actually given, not those refused, were sent to the jury or to request a cautionary instruction (former CALJIC No. 14.75) on how to consider written instructions, whether typed, printed, or handwritten. (*Id.* at pp. 989-990.)

Although here the court's written answers were more expansive than what had been discussed, defendant fails to show how the instructions were inaccurate or how defendant could have amplified, clarified, or modified the court's response. Trial counsel claimed the response interfered with jury deliberations but failed to explain how. On the question of possible prejudice, this case bears closer resemblance to *People v. Alcalde* (1944) 24 Cal.2d 177, where the trial court's communication with the jury outside the presence of defendant and his counsel was found harmless. In *Alcalde*, the jury sent a note asking if it could render a decision of life imprisonment and not eligible for parole. The trial court returned the note with the notation, "the answer is 'No'." (*Id.* at pp. 188-189.) Our Supreme Court found no prejudice because the court could not have given any other answer. (*Id.* at p. 189; see *People v. Woods* (1950) 35 Cal.2d 504, 512 [trial court's ex parte communication with juror explaining meaning of term "hung jury" was harmless error].) Similarly, here defendant's briefing does not argue prejudice, and none appears.

V

Denial of Continuance at Sentencing

Defendant contends the trial court abused its discretion in denying his request to continue sentencing. He asserts he received the probation report only the day before and wanted to refute its statement that he had violated parole.

Defendant's original sentencing date was August 29, 2016. He moved for a continuance, in part to file a motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), and the trial court granted a continuance to September 16, 2016. There was a further continuance to October 3, 2016. On that date, defendant asked his attorney to request yet another continuance, so his sister could be present to make a statement and to subpoena records to challenge the People's claim that he had two violations of parole. Counsel's attempt to contact parole and verify whether there were parole violations had not been fruitful. The court denied the continuance.

“[T]he trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. [Citations.] A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence. [Citations.] When a continuance is sought to secure the attendance of a witness, the defendant must establish ‘he had exercised due diligence to secure the witness’s attendance, that the witness’s expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.’ [Citation.] The court considers ‘ “not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.” ’ [Citation.] The trial court’s denial of a motion for continuance is reviewed for abuse of discretion. [Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

The trial court did not abuse its discretion in denying a third continuance for sentencing, as defendant failed to show good cause. He failed to show diligence in securing the attendance of his sister. Moreover, his sister submitted a lengthy letter to the court in support of defendant. Other family members and friends also submitted letters. Defendant has not shown that his sister’s testimony would have provided any different and more useful information.

Defendant contends a continuance was necessary because he saw the probation report, with the claim of two parole violations, only the day before sentencing. His counsel, however, told the court that defendant was concerned that in the opposition to his *Romero* motion, the People said defendant had two violations of parole and “my client has been adamant since I met him that he did not.” Counsel thus acknowledged that the issue of whether defendant had in fact violated parole was known to defendant and his counsel well before the date of sentencing. In addition, the court allowed defendant to explain his position, that he had been found not guilty on the two parole

violations. In denying the *Romero* motion, the court stated it understood defendant's position and did not mention the alleged parole violations as a reason for the denial.

VI

Denial of Romero Motion

Defendant contends the trial court abused its discretion in denying his motion pursuant to *Romero, supra*, 13 Cal.4th 497 to strike his strike. He contends his strike should have been dismissed because he was only 16 years old when he committed the prior offense and he had no other criminal record until the current offense which he committed under stressful circumstances.

“[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*)). “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ‘ “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’ [Citation.] Second, a ‘ “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 376-377.)

“[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions,

and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

Our review of these considerations shows the trial court did not abuse its discretion in refusing to grant the *Romero* motion. The court's decision is not “so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at p. 377.)

Defendant contends the current crime was committed under extenuating circumstances: he was concerned about his father who had kidney failure and was unable to pay his rent. Defendant's brother had died that year and he was depressed and started abusing antidepressants and other drugs. He claimed he committed the robbery while he was “not in [his] right mind.” Defendant's current offense, robbery, is a violent felony. Although defendant did not use a weapon, his victim, the teller, was considerably affected by the crime and the attendant fear. She left her job at the bank and remained fearful at the time of trial. Defendant told the probation officer that what he did was a mistake, but also blamed the California justice system. He expressed no remorse for the effect of his crime on the victim.

Defendant discounts his prior conviction because he was only 16 years old at the time. But he was convicted of assault with an enhancement for inflicting bodily injury that caused the victim to become comatose or suffer paralysis (§ 12022.7, subd. (b)), a very serious crime. He described the offense for the court: “I was walking away from a high school dance and he approached me, he was drunk. The only reason that his injuries were sustained that much was because his blood alcohol level was high, and when I picked him up and slammed him, he fell into a coma, and it was something that can happen to any sixteen-year-old that's getting in a fight” The last part of this

statement indicates defendant fails to appreciate the seriousness of what he did; this was not a typical teenage fist fight. Further, he blames the victim for the extent of his injuries.

Defendant stresses his character and prospects. He has the strong support of his family, he had held several jobs, took college courses, and completed programs while in prison. Although he had relapsed and was abusing drugs, he had been accepted into a drug and alcohol treatment program.

The trial court understood its discretion and considered all these factors in reaching its decision, focusing on his two violent felonies. “Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling” (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Defendant’s circumstances were not so extraordinary that the failure to strike his prior conviction constitutes an abuse of discretion. (See *Carmony, supra*, 33 Cal.4th at p. 378.)

VII

Defendant’s 11-Year Sentence

Defendant contends the trial court erred in sentencing him to 11 years in prison. He contends there was a distortion in weighing the aggravating and mitigating factors. Specifically, he challenges the aggravating factors of drug use, threat of great bodily injury, particularly vulnerable victim, planning, and his prior conviction. Because defendant failed to object to these aggravating factors at sentencing, he has forfeited the challenge to them on appeal.

In *People v. Scott* (1994) 9 Cal.4th 331, 351-356, our Supreme Court held that claims of error in the trial court’s exercise of its sentencing discretion are forfeited if not raised at the sentencing hearing. “We conclude that the waiver doctrine should apply to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly

erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons.” (*Id.* at p. 352.) An exception is the claim that a sentence is unauthorized. (*Id.* at p. 354.)

Defendant did not address *Scott* in his opening brief. In his reply brief, he argues that although he did not specifically raise the issues he now raises on appeal, counsel did make a plea for the lowest possible sentence based on mitigating factors. This request is insufficient to preserve the issue for appeal. A plea for leniency is not the same as a specific objection that the facts do not support one or more aggravating factors.

Defendant next suggests he did not have a meaningful opportunity to object to the aggravating factors. The aggravating factors were set forth in the probation report. The time for defendant to object was when the trial court asked for final comments on sentencing.

Finally, defendant contends this court has inherent power to rule on these objections and claims counsel’s failure to object was ineffective assistance of counsel. While we have discretion to rule on a question that has not been preserved for appeal (*Williams, supra*, 17 Cal.4th at p. 161, fn. 6), we decline to exercise that discretion here. *Scott* has been the law for over 20 years. As for defendant’s undeveloped claim of ineffective assistance of counsel (made for the first time in his reply brief), we note that defendant is not challenging all of the aggravating factors. Only a single aggravating factor is required to impose the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728), and here the trial court imposed the *middle term*. Defendant has not shown a reasonable probability, a probability sufficient to undermine confidence in the outcome, that the result would have been different absent counsel’s alleged errors. (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

VIII

Senate Bill No. 1393

Just before oral argument, defendant requested leave to file a supplemental brief concerning the impact of Senate Bill No. 1393. Defendant contends this case must be remanded to the trial court to exercise its discretion to strike the five-year prior enhancement (§ 667, subd. (a)) as now permitted by Senate Bill No. 1393. At oral argument, the People conceded a limited remand for this purpose is appropriate. Defendant argued the remand should not be limited to the five-year enhancement; instead, the trial court should be permitted to review the entire sentence. We agree with the People that only a limited remand is appropriate.⁴

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the pre-2019 versions of these statutes, the court is required to impose a five-year consecutive term for “any person convicted of a serious felony who previously has been convicted of a serious felony” (§ 667, subd. (a)), and the court has no discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (§ 1385, subd. (b).)

The statutory changes of Senate Bill No. 1393 apply retroactively to any case that is not final on January 1, 2019, under the rule of *In re Estrada* (1965) 63 Cal.2d 740. “The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend

⁴ We deny as moot defendant’s request for leave to file a supplemental brief based on *People v. Garcia* (2018) 28 Cal.App.5th 961.

as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.” (*People v. Conley* (2016) 63 Cal.4th 646, 657.)

The same inference of retroactivity applies when an amendment ameliorates the possible punishment. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.) When a statutory amendment “ ‘vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,’ ” there is “an inference that the Legislature intended retroactive application ‘because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.’ ” (*Ibid.*, quoting *People v. Francis* (1969) 71 Cal.2d 66, 76.)

Under the *Estrada* rule, as applied in *Francis* and *Lara*, we infer as a matter of statutory construction, that the Legislature intended Senate Bill No. 1393 to apply to all cases not yet final on January 1, 2019. (*People v. Garcia, supra*, 28 Cal.App.5th at p. 973.) Accordingly, we remand the matter to the trial court for the limited purpose of the exercise of discretion to strike the five-year enhancement.

Defendant contends the remand should not be so limited. He urges a broader remand to permit the trial court to reconsider his entire sentence. He bases his request on concerns with the sentencing, particularly the failure to grant his *Romero* motion to strike his strike. We have found no error in the trial court’s ruling on the *Romero* motion and find no basis to reopen defendant’s sentencing other than for the limited purpose of the exercise of discretion now permitted by Senate Bill No. 1393.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the limited purpose of the exercise of discretion to dismiss the five-year enhancement of section 667, subdivision (a).

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Hoch, J.